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Application No.: 10/736,282

Inventors: Hiroshi Nakahata *et al.*

Filed: December 15, 2003

Docket No.: AA556C

Confirmation No.: 4285

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1) Appeal Brief (14 pages)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/736,282
Inventor(s) : Hiroshi Nakahata *et al.*
Filed : December 15, 2003
Art Unit : 3761
Examiner : Melanie Jo Hand
Docket No. : AA556C
Confirmation No. : 4285
Customer No. : 27752
Title : Absorbent Article Having Extensibility At Waist Panel

APPEAL BRIEF

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Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office Final Office Action dated January 18, 2007. A timely Notice of Appeal was filed on April 18, 2007.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

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STATUS OF CLAIMS

Claims 1 – 18 are pending. Claims 1 – 18 stand rejected. Claims 1 – 18 are being appealed. A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

An amendment to comply with a requirement of form set forth in the Final Office Action dated January 18, 2007 was filed on June 14, 2007 under 37 C.F.R. §41.33(a). At this time, Applicants are unaware of whether or not the amendment has been entered.

SUMMARY OF THE CLAIMED SUBJECT MATTER

1. Claim 1 relates to an absorbent article having a pair of longitudinal side edges, a first end edge, a second end edge, a first waist panel adjacent to the first end edge, a second waist panel adjacent to the second end edge, a crotch panel positioned between the first and second waist panels, and a side panel extending laterally outwardly from the first or second waist panel (see, *inter alia*, page 4, lines 10 – 20 and FIG. 1), the absorbent article comprising a liquid pervious topsheet, an absorbent core disposed underneath the topsheet, and a chassis layer (see, *inter alia*, page 4, lines 26 – 27 and FIG. 3), wherein the first or second waist panel comprises a portion of the chassis layer (see, *inter alia*, page 5, lines 29 – 30 and FIG. 1), the chassis layer including a plurality of spaced discontinuities regularly disposed in at least a portion of the first or second waist panel (see, *inter alia*, page 7, lines 23 – 24 and FIG 4) such that when the waist panel is subject to tension the discontinuities provide openings that extend through the chassis layer thereby providing the chassis layer with extensibility in the transverse direction (see, *inter alia*, page 7, lines 30 – 31 and FIGS 5 – 6); and an extensibility controlling means to control the extensibility of the chassis layer, wherein the extensibility controlling means inhibits the chassis layer from extending beyond extensibility causing breakage of the chassis layer (see, *inter alia*, page 11, lines 26 – 30 and FIG 1).

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GROUND OF REJECTION TO BE REVIEWED ON APPEAL

- 1) Claims 1 – 18 stand rejected under 35 U.S.C. 102(b) as anticipated by U.S. Pat. No. 5,873,868 issued to Nakahata (hereinafter “Nakahata”).
- 2) Claim 3 stands rejected under 35 U.S.C. §102(b) or, in the alternative, under 35 U.S.C. §103(a) as unpatentable over Nakahata.

ARGUMENTS

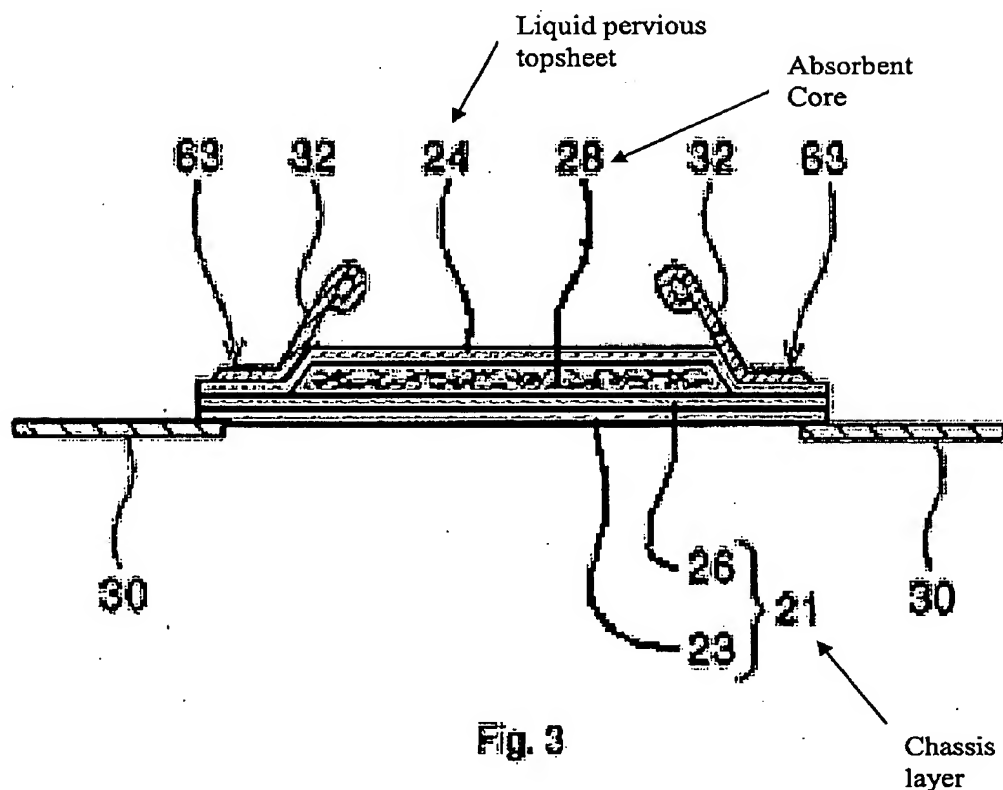
1) Claims 1 – 18 are not anticipated by Nakahata under 35 U.S.C. § 102(b).

It is well settled that a claim is anticipated only if each and every element as set forth in the claims is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Applicants submit that Nakahata does not teach each and every element recited in claims 1 – 18.

Claim 1 of the present application recites, *inter alia*, a chassis layer including a plurality of spaced discontinuities regularly disposed in at least a portion of the first or second waist panel such that when the waist panel is subject to tension the discontinuities provide openings that extend through the chassis layer thereby providing the chassis layer with extensibility in the transverse direction.

For the sake of clarity Fig. 3 is shown at the top of page 4. In an effort to more clearly show particular elements depicted in Fig. 3, Applicants have labeled the elements as they are referred to in the present application. As can be seen in the embodiment exemplified by Fig. 3, the topsheet (24) and the chassis layer (21) are clearly shown as two separate, distinct elements positioned on opposite sides of an absorbent core (28).

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In an effort to properly construe the term “chassis layer,” as recited in claim 1 of the present application, Applicants offer the following disclosure in addition to FIG 3. The present application discloses “[t]he topsheet is positioned adjacent the body-facing surface of the absorbent core 28” (The present application, page 4, lines 34 – 35) (emphasis added). The present application also discloses “[t]he chassis layer 21 forms the exterior of the diaper 20, i.e., face away from the wearer.” (The present application, page 6, line 1) (emphasis added). The present application further discloses “[t]he chassis layer is also preferably impervious to liquids (e.g., urine) so that it may also serve as a component which prevents exudates absorbed and contained in the absorbent core from wetting garments which contact the diaper such as bed sheets and undergarments (i.e., it acts as the traditional diaper backsheet).” (The present application, page 6, lines 6 – 9) (emphasis added).

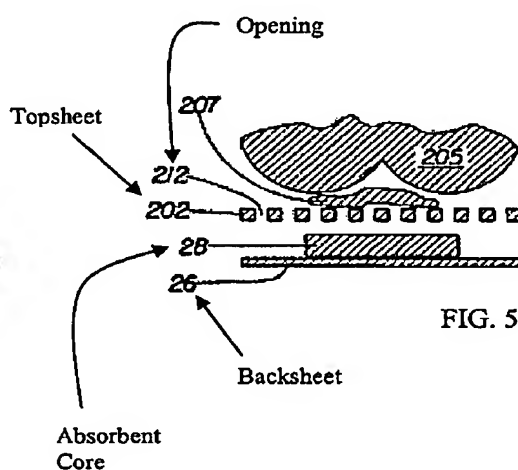
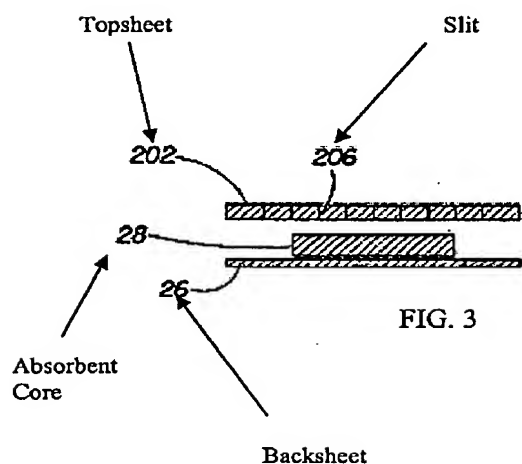
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The Final Office Action of January 18, 2007 states

Nakahata teaches . . . a chassis layer 22, the chassis layer including a plurality of spaced discontinuities 206 regularly disposed in at least a portion of the first or second waist panel 46, 44 such that when the waist panel is subject to tension the discontinuities provide openings that extend through the chassis layer 22 . . .

(The Office Action, page 3). Applicants respectfully disagree with the Office's reading of Nakahata.

As best understood by Applicants, Nakahata is directed to an absorbent article topsheet having a plurality of openings to permit solid and semi-solid bodily exudates to pass through the topsheet to the absorbent core as the absorbent article is worn, and when the absorbent article is removed from the wearer the openings close in order to substantially conceal from view the bodily exudates. (Nakahata, abstract). For the sake of clarity, FIGs 3 and 5 of Nakahata are shown below. Applicants have labeled particular elements in the figures as they are referred to in Nakahata. From the figures, it can be clearly seen that it is the topsheet that has openings extending therethrough and not the chassis (i.e., backsheet), as asserted in the Office Action.



Nakahata discloses a diaper preferably comprising a liquid pervious topsheet, a liquid impervious backsheet, and an absorbent core positioned therebetween. (Nakahata, col. 3, lines 16 - 20). Nakahata discloses slits 206 that extend through the topsheet 202. (Nakahata, col. 11,

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lines 6 – 8 and FIG 3). Nakahata discloses that laterally directed tensile force can cause the edges of the slits 206 to separate from each other to provide individual openings 212. (Nakahata, col. 11, lines 30 – 36 and FIG. 5). Nakahata repeatedly discloses openings 212 that extend through the topsheet 202, however, it is Applicants' position that the topsheet of Nakahata is not the same as the chassis layer recited in claim 1 of the present application, and Applicants are unable to find any evidence or reasoning to the contrary.

Applicants would like to point out that the portions of Nakahata cited in the Office Action do not disclose a chassis layer having openings that extend therethrough, as asserted in the Office Action. Applicants remind the Office that in rejecting claims for want of novelty or for obviousness, the examiner must cite the best references at his or her command. When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. (37 C.F.R. § 1.104(c)(2)). Applicants submit that, absent any evidence or reasoning as to why the topsheet of Nakahata is the same as the chassis layer recited in claim 1 of the present application, the Office Action has not properly designated a particular part of Nakahata that teaches a chassis layer having openings that extend therethrough.

In the Advisory Action dated March 12, 2007, the Office stated

all of the limitations of claim 1 are met by Nakahata, regardless of what the applicant chooses to call each item. Any perceived or actual structural difference between the chassis layer and the prior art has not been clearly established in the claims. It is not sufficient that these differences exist in the specification and drawings.

(The Advisory Action, page 2). Applicants respectfully remind the Office that when construing claims, the meanings of the words used in the claim are not construed in a lexicographic vacuum, but in the context of the specification and drawings. (*Toro Co. v. White Consolidated Industries, Inc.*, 199 F.3d 1295, 1301, 53 USPQ2d 1065, 1069 (Fed. Cir. 1999)). It is Applicants' position that the present specification clearly defines a chassis layer through the use of the drawings and the descriptions of the chassis layer function and location. Thus, Applicants submit that the chassis layer recited in claim 1 of the present application is clearly distinguished from the topsheet of Nakahata.

Notwithstanding the lack of teaching by Nakahata of a chassis layer having openings extending therethrough, it is also Applicants' position that Nakahata fails to teach an

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extensibility controlling means to control the extensibility of the chassis layer, as is recited in claim 1 of the present application.

The Office Action states "Nakahata teaches . . . an extensibility controlling means in the form of an elastically extensible topsheet 24 to control the extensibility of the chassis layer 22" (The Office Action dated January 18, 2007, page 3). Applicants appreciate that Nakahata may disclose an extensible topsheet, but Applicants submit that such disclosure does not necessarily mean that the extensible topsheet is configured to inhibit the chassis layer from extending beyond extensibility causing breakage of the chassis layer, as is recited in claim 1 of the present application.

In addition, Applicants are unsure how the topsheet may simultaneously function as both the extensibility controlling means and the chassis layer having openings extending therethrough. As best understood by Applicants, the Office Action equates the topsheet of Nakahata, which has openings extending therethrough, to the chassis layer having openings extending therethrough recited in claim 1 of the present application. As pointed out above, the Office Action asserts that the elastically extensible topsheet of Nakahata is functioning as the extensibility controlling means, but the Office Action does not provide any reasoning or evidence as to how the topsheet of Nakahata inhibits itself from extending beyond any particular range, let alone beyond extensibility causing damage.

In light of the above remarks, it is Applicants' position that Nakahata does not teach each and every element recited in claim 1 of the present application or any claims that depend therefrom. Accordingly, Applicants respectfully request that the rejection of claims 1 – 18 under 35 U.S.C. §102(b) in view of Nakahata be overturned by the Honorable Board.

2) Claim 3 is not anticipated by Nakahata under 35 U.S.C. §102(b) and is patentable over Nakahata under 35 U.S.C. §103(a).

For the sake of brevity, Applicants will not repeat the above remarks made with regard to the rejection of claims 1 – 18 under 35 U.S.C. §102(b). Applicants submit that the rejection of claim 3 is improper for at least the same reasons as stated above.

The Office Action states "Nakahata teaches the same materials for topsheet 24 as those set forth in the claimed disclosure. Thus, while Nakahata is silent regarding a percentage elongation of the topsheet associated with a tension force of 125 grams/25 mm, the topsheet 24

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is considered herein to inherently possess the property set forth in claim 3." (The Office Action dated January 18, 2007, page 5).

First, Applicants submit that the Office Action fails to point to the particular part of Nakahata relied upon to support the assertion that Nakahata teaches the same materials for a topsheet as the present application, as is required by 37 C.F.R. §1.104(c)(2). Thus, the rejection is improper for at least this reason.

Second, to establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient. (*In re Robertson*, 169 F. 3d 743, 745, 49 USQ2d 1949, 1959-51 (Fed. Cir. 1999) (citations omitted)).

Even assuming that Nakahata discloses the same materials for use in a topsheet as are disclosed in the present application, there is still no teaching that the materials are configured to provide the property recited in claim 3 of the present application. For example, Applicants submit that one of ordinary skill in the art would recognize that differences in the thickness or density of a topsheet may impact the elongation of the topsheet at a particular tension force. Thus, while the same materials may be used to construct two different topsheets, the properties of the resulting topsheets may not necessarily be the same.

In light of the above remarks, it is Applicants' position that Nakahata does not teach or suggest each and every element of claim 3. Accordingly, Applicants respectfully request that the rejection of claim 3 under 35 U.S.C. §102(b) or, in the alternative, under 35 U.S.C. §103(a) in view of Nakahata be overturned by the Honorable Board.

SUMMARY

Claims 1 – 18 have not been properly rejected in the Final Action for all of the reasons discussed above.

The rejection of claims 1 – 18 appears to be based on improper claim construction and/or an improper characterization of the scope and content of Nakahata. In addition, the rejection of

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claim 3 further appears to be based on an improper assertion of inherency, as well as an improper obviousness analysis.

As such, the rejections of claims 1 – 18 should all be reversed by the Honorable Board of Patent Appeals and Interferences.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY

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CLAIMS APPENDIX (Serial No. 10/736,282)

Appealed Claims – Case AA556C

1. (Rejected) An absorbent article having a pair of longitudinal side edges and a first end edge, a second end edge, a first waist panel adjacent to the first end edge, a second waist panel adjacent to the second end edge, a crotch panel positioned between the first and second waist panels, and a side panel extending laterally outwardly from the first or second waist panel, the absorbent article comprising a liquid pervious topsheet, an absorbent core disposed underneath the topsheet, and a chassis layer, wherein the first or second waist panel comprises a portion of the chassis layer, the chassis layer including a plurality of spaced discontinuities regularly disposed in at least a portion of the first or second waist panel such that when the waist panel is subject to tension the discontinuities provide openings that extend through the chassis layer thereby providing the chassis layer with extensibility in the transverse direction; and an extensibility controlling means to control the extensibility of the chassis layer, wherein the extensibility controlling means inhibits the chassis layer from extending beyond extensibility causing breakage of the chassis layer.
2. (Rejected) The absorbent article of Claim 1 wherein the extensibility causing breakage of the chassis layer is more than 20 %.
3. (Rejected) The absorbent article of Claim 2 wherein the extensibility controlling means inhibits the chassis layer from extending beyond 20 % at tension force of 125 grams/25mm.
4. (Rejected) The absorbent article of Claim 3 wherein the extensibility controlling means is disposed in the first or second waist panel in the transverse direction across at least the transverse width of the plurality of spaced discontinuities.
5. (Rejected) The absorbent article of Claim 4 wherein the extensibility controlling means is disposed along an end edge.
6. (Rejected) The absorbent article of Claim 5 wherein the extensibility controlling means is a stretchable elastic material.

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7. (Rejected) The absorbent article of Claim 1 wherein the chassis layer comprises a liquid impervious material.
8. (Rejected) The absorbent article of Claim 1 wherein the absorbent article comprises a liquid impervious sheet disposed between the absorbent core and the chassis layer.
9. (Rejected) The absorbent article of Claim 7 wherein the absorbent core does not extend into the first or second waist panel in which the discontinuities are provided.
10. (Rejected) The absorbent article of Claim 8 wherein the absorbent core does not extend into the first or second waist panel in which the discontinuities are provided.
11. (Rejected) The absorbent article of Claim 1 wherein the discontinuities are selected from the group consisting of: slits, cuts, and perforations.
12. (Rejected) The absorbent article of Claim 11 wherein the discontinuities comprise a plurality of cuts wherein the cuts comprise rectilinear cuts, curvilinear cuts, or combinations thereof.
13. (Rejected) The absorbent article of Claim 1 wherein the discontinuities are regularly disposed in the chassis layer.
14. (Rejected) The absorbent article of Claim 1 wherein the discontinuities are oriented such that the discontinuities extend in a longitudinal direction.
15. (Rejected) The absorbent article of Claim 14 wherein the discontinuities are aligned such that the discontinuities form a plurality of laterally spaced columns which extend in the longitudinal direction.
16. (Rejected) The absorbent article of Claim 1 wherein the discontinuities comprise a plurality of edges wherein the edges are treated.
17. (Rejected) The absorbent article of Claim 1 wherein the discontinuities are arranged such that the application of a tensile force to the chassis layer results in a plurality of equal area openings having an area from about 1 mm² to about 2500 mm².

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18. (Rejected) The absorbent article of Claim 1 wherein the discontinuities are arranged such that the application of a tensile force to the chassis layer results in a plurality of openings having an area from about 1 mm² to about 2500 mm².

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EVIDENCE APPENDIX (Serial No. 10/736,282)

No additional evidence is being submitted herewith.

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RELATED PROCEEDINGS APPENDIX (Serial No. 10/736,282)

There is no additional information for the Related Proceedings Appendix in this appeal.